

1                               IN THE SUPREME COURT OF THE UNITED STATES  
2   - - - - - X  
3   REPUBLIC OF AUSTRIA, ET AL. ,       :  
4                               Petitioners                               :  
5               v.                               : No. 03- 13  
6   MARIA V. ALTMANN                               :  
7   - - - - - X  
8   Washington, D. C.  
9   Wednesday, February 25, 2004  
10                            The above-entitled matter came on for oral  
11   argument before the Supreme Court of the United States at  
12   11: 13 a. m  
13   APPEARANCES:  
14   MR. SCOTT P. COOPER, ESQ. , Los Angeles, California; on  
15               behalf of Petitioners.  
16   THOMAS G. HUNGAR, ESQ. , Deputy Solicitor General, Department  
17               of Justice, Washington, D. C. ; on behalf of the United  
18               States, as amicus curiae, supporting the Petitioners.  
19   E. RANDOL SCHOENBERG, ESQ. , Los Angeles, California; on  
20               behalf of the Respondent.  
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P R O C E E D I N G S

(11:13 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next  
in 03-13, the Republic of Austria v. Maria Altmann.

Mr. Cooper.

ORAL ARGUMENT OF SCOTT P. COOPER  
ON BEHALF OF THE PETITIONERS

MR. COOPER: Mr. Chief Justice, and may it please  
the Court:

Landgraf and its progeny provide the basis for a  
decision in this case. In enacting the FSIA, Congress did  
not direct that it apply retrospectively to events that  
occurred prior to its enactment. Moreover, application of  
the 1976 expropriation exception to alleged conduct that  
occurred in and before 1948 would change the legal  
consequences of that conduct, and therefore be impermissibly  
retroactive.

QUESTION: What -- why would it change the legal  
consequences? It -- wouldn't it just change where you can,  
where you can sue?

MR. COOPER: No, in fundamental terms it would  
change the legal consequences. Prior to 1976, there was  
complete immunity in this country for claims of  
expropriation. Foreign sovereigns had an expectation that  
they would not be hailed into our courts to answer for the

1 internal exercise of their sovereign activities, and that is  
2 the fundamental aspect of --

3 QUESTION: Did the Tate letter have any coverage  
4 prior to '76, the so-called Tate letter from the State  
5 Department?

6 MR. COOPER: The so-called Tate letter changed the  
7 State Department's position with respect to commercial  
8 activities as of 1952. This conduct all preceded 1952 and  
9 concerned what has always been recognized as essentially  
10 public acts, that is, acts of expropriation.

11 But to finish the answer to Justice Scalia, the --  
12 the issue that underlies the whole concept of foreign  
13 sovereign immunity at its very basis is the question of  
14 whether our courts, in the case of United States'  
15 jurisdiction, will exercise jurisdiction to question past  
16 judgment on the sovereign conduct of foreign states acting  
17 in their own -- within their own borders with respect to  
18 property within their own country in this case. And that's  
19 something that as a matter of comity and as a matter of  
20 international concepts of orderly relationships between  
21 sovereigns that we don't tolerate.

22 QUESTION: But I thought that -- well, first, I  
23 think you recognize that this suit could be brought inside  
24 Austria, and then one of the countries that don't follow the  
25 -- the absolute rule. Then it seems to me that Justice

1    Scalia is right, it's a question of where you can sue.    You  
2    -- your argument is the United States has been self-denying,  
3    but countries like Austria itself that don't follow that  
4    absolute rule could be a proper forum

5               MR. COOPER: With respect, Justice Ginsburg, the --  
6    this issue of the adoption of the restrictive theory by any  
7    country is really a red herring here.    The expropriation  
8    exception concerns itself with what has always been  
9    recognized as a public act, and that is that the act of  
10   expropriation, something that can only be done by a  
11   governmental entity through the exercise of its governmental  
12   authority.

13              QUESTION: But I -- as I understand this claim,  
14   it's not the original ex parte -- expropriation is when  
15   Austria isn't even a country, because this happened in the  
16   Nazi period, right?

17              MR. COOPER: No, Your Honor.    The United States'  
18   position throughout World War II and thereafter has been  
19   that Austria retained its sovereignty, that it was an  
20   occupied state by the Nazi regime.    The United States  
21   immediately recognized --

22              QUESTION: Then why was there a second republic?

23              MR. COOPER: The second republic was the  
24   reconstituted government of the state of Austria, but the  
25   United States' position, and it is the executive's position

1 that has binding authority with respect to the sovereign  
2 status, the executive's position was that Austria was always  
3 a state.

4 More importantly, Your Honor --

5 QUESTION: But may I continue, because I thought  
6 that this claim, whatever you say about Austria's status in  
7 the, at the time of the Anschluss, that it's not necessarily  
8 about the stealing of the goods, it's about the retention of  
9 the goods.

10 MR. COOPER: We don't believe that that's a correct  
11 reading of section 1603 -- 1605(a)(3). 1605(a)(3) concerns  
12 itself with the expropriation of property. The Congress --  
13 I articulated the power for the enactment of the  
14 expropriation exception as the power to define and punish  
15 violations of the laws of nations, and it is not even  
16 arguably the case that a possession of expropriated  
17 property, especially as it's been argued by the respondent,  
18 not necessarily even having been expropriated by the  
19 defendant country, is a violation of international law.

20 QUESTION: So if you know that you've taken from an  
21 expropriator, that's all right under international law?

22 MR. COOPER: It's not a question of whether it's  
23 all right. It's a question of whether Congress decided that  
24 it was a basis for an exception to the long-standing and  
25 general rule of law in this country, that is, sovereign

1 immunity. So in other words, has -- has Congress determined  
2 that one of the narrow and specified exceptions to foreign  
3 sovereign immunity is the mere possession of property?

4 QUESTION: Is it sovereign immunity or is it the  
5 act of state doctrine?

6 MR. COOPER: It's sovereign immunity, Your Honor.

7 QUESTION: Well, but, I mean, even -- there --  
8 there are two things that happen here. The sovereign can be  
9 brought into court, but more than that, the sovereign can be  
10 held to account for the act of the sovereign on its own  
11 territory. The latter, it seems to me, can be described as  
12 substantive law, the former, just allowing the sovereign to  
13 come into your -- or allowing your court to entertain a suit  
14 against the sovereign is -- is just -- just where suit goes.  
15 It has nothing to do with the outcome of the suit.

16 MR. COOPER: This Court determined --

17 QUESTION: So I -- I wish you could tell me that it  
18 did have to do with the act of state doctrine, because that  
19 would be -- that would be a substantive change and that  
20 should not be retroactive.

21 MR. COOPER: The -- the active state doctrine is an  
22 independent doctrine that is not before the Court today.  
23 The sovereign immunity doctrine is before the Court today.  
24 Sovereign immunity, this Court decided in Verlinden, is a  
25 matter of substantive Federal law. This Court made that

1 decision after careful consideration and with specific  
2 reference to the FSIA and Congress' power to enact it, and  
3 concluded that it was more than a jurisdictional statute.

4           Moreover, in the Hughes case, this Court  
5 determined that merely articulating a statute's terms in  
6 terms of jurisdiction does not remove it from the  
7 retroactivity analysis we urge is the rule of law that --  
8 that determines the outcome of this case. Quite the  
9 contrary. Hughes made it clear that in circumstances very  
10 much like these, where a cause of action was not previously  
11 allowed, and here the immunity kept a -- an action for  
12 expropriation from being adjudicated in American courts  
13 under those circumstances. As of 1976, there was a  
14 fundamental change in the law with respect to foreign  
15 sovereigns.

16           QUESTION: Well, in Hughes -- in Hughes there were  
17 -- there were other changes besides the -- besides the  
18 jurisdictional one. There -- there were defenses that were  
19 eliminated. I don't think Hughes is a very good -- good  
20 case for you, but Verlinden, it seems to me, is -- is -- is  
21 closer, but we were determining there whether it was a  
22 substantive law or not for a very different purpose, for the  
23 existence of -- of power on the part of the Federal  
24 Government to -- to enact the statute. That's a -- that's a  
25 bit different from the purpose for which we're determining



1    whether it's a substantive law here.

2                   MR. COOPER: The interest of the United States,  
3    Your Honor, in the -- the administration of cases against  
4    foreign sovereigns has long been recognized by this Court as  
5    being a -- a matter of great national interest. The  
6    question of when we decide to exercise jurisdiction over  
7    foreign sovereigns is an essential component of the way this  
8    country interacts with other countries. It's an area in  
9    which the Constitution conferred responsibility on the  
10   political branches. The executive exercised that  
11   responsibility for the vast portion of this country's  
12   history and then submitted to Congress an act, the Foreign  
13   Sovereign Immunity Act, which Congress then enacted, and  
14   created --

15                  QUESTION: But none of that's in question.

16                  MR. COOPER: -- very narrow exceptions to the  
17   doctrine.

18                  QUESTION: None of that's in question. The only  
19   thing that's in question is when Congress enacted this, did  
20   they intend it to have the effect of -- of -- what should I  
21   say -- de-immunizing, if you want to put it that way, prior  
22   acts or not.

23                  MR. COOPER: And it --

24                  QUESTION: We're -- we're not questioning the  
25   authority of the executive or the authority of the

1 legislature or the importance of this matter. Essentially,  
2 the issue is, what did Congress mean by this statute?

3 MR. COOPER: And Congress in this Court has clearly  
4 articulated in -- in Landgraf and in the -- the several  
5 cases that followed it, exactly how we determined what it  
6 was that Congress did as it relates to the retroactive  
7 aspects of those changes in law.

8 QUESTION: And in -- in our domestic jurisprudence,  
9 we are cautious about retroactivity because it destroys  
10 subtle expectations. Is that same rationale applicable when  
11 we're talking about foreign sovereign immunity, or are there  
12 other considerations such as the dignity or -- of the  
13 foreign state?

14 MR. COOPER: We think when the issue of a concept  
15 of basic fairness so close to the root of our understanding  
16 of what constitutes fair treatment of any individual, that  
17 no less standard --

18 QUESTION: Well, that's why --

19 MR. COOPER: -- no less rigorous standard than  
20 Landgraf should apply.

21 QUESTION: That leads to my -- my next question.  
22 If we're talking about expectations, my understanding --  
23 correct me if I'm wrong -- is that in 1948 Austria was --  
24 and all countries -- were on notice that immunity would be  
25 judged later on by acts of the executive, or in this case,

1 by an act of Congress. Wasn't the expectation here that  
2 there would be a later determination of whether there was  
3 immunity?

4 MR. COOPER: The expectation was that, based on the  
5 general concepts of international law and general concepts  
6 of comity, which are not just a question of whim or  
7 courtesy, but rather a question of fair treatment of one  
8 sovereign by another with the expectation that the sovereign  
9 who is declining jurisdiction would be fairly treated in the  
10 courts of other countries.

11 QUESTION: But still whether or not there would be  
12 immunity, Austria and all other countries knew, would be a  
13 later determination, so that the expectation they had was to  
14 that extent necessarily, it seems to me, diminished --

15 MR. COOPER: The expect --

16 QUESTION: -- or qualified.

17 MR. COOPER: Expectations are only one of a number  
18 of factors that the Court has referred to in Landgraf.

19 QUESTION: So it's -- so there are additional  
20 factors other than expect. What are the additional factors?

21 MR. COOPER: Well, certainly. Landgraf quoted  
22 Justice Story in his 1814 articulation of what was relevant,  
23 but the factors are expectations, changed circumstances, and  
24 changed considerations for the parties. Any case that  
25 increases liability, for instance, for a particular act is

1 considered to be --

2 QUESTION: Let's just stick -- stick with  
3 expectations --

4 MR. COOPER: -- part of common sense --

5 QUESTION: -- for the moment. Let's -- before you  
6 get off of expectations, I don't know that we protect  
7 expectations of the sort that -- that you're talking about.  
8 Let's assume that a state which has not -- not previously  
9 allowed a tort action by -- by two out-of-state people,  
10 between two out-of-state people, to be brought within that  
11 state. Let's assume they change their law and they say, you  
12 know, in the future, you -- you can bring a tort action.

13 Do you think that -- that we would say, you're --  
14 you're disrupting people's expectations if you allow those  
15 persons who are -- who are the parties to a tort in another  
16 state before this statute was passed to sue in the new  
17 state?

18 MR. COOPER: Our concepts of --

19 QUESTION: What expectation, you know? I expected  
20 not to be able to be sued in Virginia. As it turns out, I  
21 can -- I can be sued in Virginia. Did that really affect my  
22 action in -- in this case? I can't believe that Austria  
23 when it took this action had in mind, oh, I -- I know that I  
24 -- that I can't be sued for this in the United States, I may  
25 be sueable a lot of other places.

1 MR. COOPER: Reliance --

2 QUESTION: I'm sueable here, but I'm not sueable in  
3 the United States. Who cares?

4 MR. COOPER: That kind of particularized reliance  
5 analysis has never been a part of this Court's retroactivity  
6 analysis. It -- the Court doesn't look for purposes of  
7 civil or criminal cases, can we find evidence that the  
8 individual, when that individual acted, or the party, when  
9 that party acted, had in mind the current state of law. The  
10 question has been as a matter of common sense understanding,  
11 is the new law a change in the consequences for past  
12 conduct? And --

13 QUESTION: So you're -- you're distinguishing  
14 reliance and expectation? An expectation is relevant even  
15 though there may be no reliance. Is -- do I understand you  
16 correctly?

17 MR. COOPER: We are focused on the changed legal  
18 consequences, not the subjective intention of the party in  
19 any respect.

20 QUESTION: But is -- do -- do you articulate that  
21 in terms of the country's expectation, even though the  
22 country may not have relied upon that expectation when it  
23 acted?

24 MR. COOPER: Not --

25 QUESTION: Are you drawing that distinction?

1                   MR. COOPER: Not solely. We are not focused on the  
2   expectation component of the test. We are focused  
3   primarily, although I think expectations could be a factor,  
4   we think that the more important aspect of the analysis is  
5   the changed legal circumstances. That's -- that's the core  
6   of what the --

7                   QUESTION: And the changed legal circumstance that  
8   I understand you're emphasizing here is that, at least prior  
9   to 1976, this particular possession of expropriated  
10   property, as well as the expropriation itself, would not  
11   have been cognizable in the court of any country unless  
12   possibly the country itself, which as an act of grace later,  
13   decided to -- to make its own reparations. But subject to  
14   that section -- that exception -- it would not be -- would  
15   not have been cognizable anywhere?

16                  MR. COOPER: That's absolutely correct.

17                  QUESTION: Okay.

18                  MR. COOPER: If there are no further questions at  
19   this point, I'd like to reserve time.

20                  QUESTION: Very well, Mr. McCoy -- rather, Mr.  
21   Cooper. Mr. Hungar, we'll hear from you.

22                               ORAL ARGUMENT OF THOMAS G. HUNGAR  
23                   ON BEHALF OF THE UNITED STATES AS AMICUS CURIAE  
24                               SUPPORTING THE PETITIONERS

25                  MR. HUNGAR: Mr. Chief Justice, and may it please

1 the Court:

2           The position of the United States has always been  
3 that sovereign immunity bars U. S. courts from adjudicating  
4 pre-1976 expropriation claims against foreign sovereigns.  
5 As this Court recognized in *Dames and Moore*, claims by  
6 nationals of one country against the government of another  
7 are frequently sources of friction between the two  
8 sovereigns.

9           Since 19 -- prior to 1976, therefore, and absent a  
10 waiver of sovereign immunity, expropriation claims against  
11 foreign sovereigns have always been addressed through  
12 diplomatic negotiations and foreign claims processes, and  
13 not in U. S. courts. And the United States has entered into  
14 numerous agreements with foreign countries regarding such  
15 claims, always against and with a background understanding  
16 prior to 1976 that such claims could not be adjudicated in  
17 U. S. courts.

18           QUESTION: Is -- is the friction that's feared in  
19 part based on changed expectations, or is that just  
20 irrelevant to the analysis?

21           MR. HUNGAR: Changed expectations are relevant in,  
22 in the general sense, not the particular -- particularized  
23 expectations of a particular state, but that it is a general  
24 rule and understanding of international laws set forth in  
25 the Vienna Convention on Treaties and elsewhere that changes

1 in international law, including changes in sovereign  
2 immunity law, are not retroactively applied. And there are  
3 numerous examples of the latter point cited in our brief at  
4 footnote 14, and -- and it was an absolute rule in 1948 and  
5 before.

6 QUESTION: Is the absolute rule based on the act of  
7 state doctrine or on sovereign immunity? The distinction --

8 MR. HUNGAR: Sovereign immunity. Sovereign -- it  
9 was an absolute rule of sovereign immunity --

10 QUESTION: But as you stated the proposition,  
11 you're limited to appropriation claims.

12 MR. HUNGAR: Well, that's what we're addressing  
13 here. This -- the absolute doctrine, the doctrine of  
14 absolute immunity was applicable to all claims. There is no  
15 -- there is not a single instance of any case or State  
16 Department determination prior to 1952 in which a suit was  
17 permitted to proceed against a foreign sovereign --

18 QUESTION: And then that was the Tate letter, the  
19 --

20 MR. HUNGAR: The Tate letter changed --

21 QUESTION: In '52.

22 MR. HUNGAR: With respect to commercial activity,  
23 but, of course, this is not a commercial -- it's not even  
24 alleged the -- within the commercial activity exception.  
25 We're not talking about commercial activity.



1                   QUESTION: Why is it that retroactivity --  
2 retroactivity causes more friction? Because --

3                   MR. HUNGAR: Because it would be inconsistent with  
4 the understandings with which the United States and these  
5 foreign governments operated under with claims resolution  
6 agreements with numerous countries, not merely arising out  
7 of World War II, but out of communist government  
8 expropriations and numerous agreements regarding these types  
9 of --

10                  QUESTION: But I thought part of the baseline of  
11 immunity law was that other -- foreign countries such as  
12 Austria knew that from time to time we would confer immunity  
13 or not confer immunity depending on the decision of the  
14 executive. So I don't see how wealth -- how settled this  
15 expectation or this other reliance is.

16                  MR. HUNGAR: The -- the case that -- the doctrine  
17 of absolute sovereign immunity, there were no -- there are  
18 no exceptions. There could not possibly have been  
19 expectation or reason to believe that the executive of this  
20 country would deny immunity in an expropriation case because  
21 that had never happened in the history of the absolute  
22 doctrine, immunity doctrine, for 150 years. No suit, again,  
23 no suit in the United States has been permitted, was  
24 permitted to proceed on any theory against a foreign  
25 sovereign in personam. It was -- it would be absolutely

1   unprecedented for such a suit to have been permitted prior  
2   to 1976, in fact, in the expropriation context. And so --

3               QUESTION: Would that be true of -- would that be  
4   true of Austria itself if the tables were turned?

5               MR. HUNGAR: It's unclear whether a -- a court  
6   action could have been brought, at least we're not familiar  
7   with anything in the record that indicates whether a court  
8   action could have been brought in 1948, under, for example,  
9   the restitution law that Austria passed in 1947.

10              QUESTION: I think there was --

11              MR. HUNGAR: But that's irrelevant because it can't  
12   be -- the retroactivity analysis has to be a term --  
13   determined on a section-by-section, or -- or provision-by-  
14   provision basis. It can't be a case-by-case, country-by-  
15   country rule.

16              QUESTION: Well, it was relevant to something that  
17   Mr. Cooper said. He said this was a matter of fairness and  
18   we want others to be treated -- treat others -- treat others  
19   well so that they will treat us well. That sounded to me  
20   like he was speaking in reciprocity terms.

21              MR. HUNGAR: Reciprocity is also an important  
22   consideration, Your Honor. If this law were to be applied  
23   retroactively, it could open the United States to reciprocal  
24   claims brought in foreign courts, which would further  
25   complicate our foreign relations.

1                   QUESTION: Well, how -- how does it work if in fact  
2   you treat the statute as purely jurisdictional? You have  
3   to, one, establish jurisdiction, they have it under 1330.  
4   You have to have venue, they established that. And then you  
5   look to see if it's wiped out by sovereign immunity, and  
6   (a)(3) says this is a case in which rights and property  
7   taken in violation of international law are an issue.  
8   Right.

9                   So suppose you said, yes, that is such a case,  
10   even though the expropriation took place in '48 or earlier  
11   perhaps. Then the State Department could come in and say,  
12   well, you don't win if you wanted to. You'd say, after all,  
13   there first is the act of state doctrine, and this was not  
14   clearly in violation of international law in 1948, or you  
15   could file, what is it called, it's a -- an information, or  
16   what is it, it's a suggestion of something or other -- it's  
17   a --

18                  MR. HUNGAR: Well, prior to --

19                  QUESTION: -- statement of interest. And you say  
20   it's the -- there's a -- there's a foreign policy interest  
21   here, and so that way the State Department's in control, and  
22   if it feels that it would hurt foreign affairs to have the  
23   suit go ahead, it says either act of state if it's not clear  
24   or a statement of interest, and a -- which is a kind of  
25   political question, I guess.

1                   And so, what -- how does that, in other words,  
2   where am I wrong in thinking there's no real foreign policy  
3   concern here in respect to the application of this statute  
4   as a purely jurisdictional matter?

5                   MR. HUNGAR: We believe that the -- as we said in  
6   our briefs, and part of the reason we're here today is that  
7   there are foreign policy concerns implicated --

8                   QUESTION: I know, and what I want to know is, what  
9   was wrong with what I just said? You see, as I was saying  
10  it -- did you follow it? One --

11                  MR. HUNGAR: Well, I'm not -- understand. We are  
12  here today saying the United States has an interest in not  
13  having this expropriation exception applied retroactively  
14  because it would undermine the background assumption --

15                  QUESTION: I understand that and I'm trying to get  
16  to the reasoning. And my thought was, I don't see why it  
17  affects foreign affairs. You can explain why. I understand  
18  you believe it does and I'm sure you're right, but I just  
19  want to know why, and the reason I find it difficult to see  
20  why is because it seems to me you still, even assuming  
21  jurisdiction, can come in and say this was an act of state,  
22  this seizure in 1948, or you can file a statement of  
23  interest, which I take it is saying there's a big foreign  
24  policy matter here and we're working it out in other forums  
25  and you courts stay out of it. Now -- now am I wrong about

1 that? I'm sure you're going to say I am wrong and I want to  
2 know why.

3 MR. HUNGAR: Well, we don't perceive a meaningful  
4 difference between an amicus brief expressing foreign policy  
5 concerns, which is what we have filed, and a statement of  
6 interest expressing foreign policy concerns.

7 QUESTION: Ah. Well, then the correct result in  
8 this case is to say yes, this statute applies, it applies to  
9 1948 seizures, because they were in violation of  
10 international law. Now, the State Department files a  
11 statement of interest saying to the court, there is a valid  
12 foreign policy reason for not going ahead in the case.

13 MR. HUNGAR: But the --

14 QUESTION: I take it, by the way, you promised you  
15 wouldn't in this case, but nonetheless, all right. So -- so  
16 if -- that would be just up to you, so if you do it, then  
17 the court will not go ahead and adjudicate this case even  
18 though there is jurisdiction under the FSIA.

19 MR. HUNGAR: Justice Breyer --

20 QUESTION: I'm missing something, so you explain it  
21 to me.

22 MR. HUNGAR: Well, several things. First of all,  
23 it's not true that we promised not to express a view --

24 QUESTION: I'm sorry I brought that up. Take that  
25 out.

1                   MR. HUNGAR: That has to do with a particular  
2   agreement entered into in 2001 and it is certainly our  
3   position that that agreement does not cover this case and  
4   that was the position we took. But again, with respect to  
5   the -- we are expressing the foreign policy concerns that  
6   I've identified, which are generalizing, go through the  
7   retroactive application of this statute generally. We're  
8   not talking just about Austria here. There are claims and  
9   potential claims against countless foreign countries, many  
10  of whom -- many of which would involve claims that were  
11  previously addressed --

12                  QUESTION: Some of them do not involve the act of  
13  state doctrine and you want us to hold that -- that -- that  
14  this would be a retroactive application of this  
15  jurisdictional statute no matter -- no matter what claim is  
16  made, whether it's an act of state claim or not. If -- if  
17  you were limiting them to act of state, I could understand  
18  it, because that's a substantive -- a substantive matter,  
19  but you want us to say no -- no suits can be brought that --  
20  out of actions that -- that arose before this.

21                  MR. HUNGAR: In principles of retroactivity, the  
22  presumption against retroactivity require --

23                  QUESTION: It's not --

24                  MR. HUNGAR: This is not a sub --

25                  QUESTION: It begs -- it begs the question whether

1 it is retroactive or not.

2 MR. HUNGAR: This is not purely -- no, Your Honor,  
3 this is not purely jurisdictional. The fact that a -- if  
4 it's true that a similar type claim could have been brought  
5 in Austria at the time, that cannot change the retroactivity  
6 analysis, because otherwise retroactivity would be  
7 determined country by country, and that fact that -- that a  
8 state by -- by an exercise of grace has chosen to allow  
9 claims that somehow deprive it would change the rules, which  
10 can't be --

11 QUESTION: Give me an example. I only have one  
12 question in this case and I've just said it and I want to be  
13 sure I get the best answer I can. So give me an example of  
14 an instance where it would hurt the foreign affairs  
15 interests of the United States if the law said you proceed  
16 as I outlined.

17 MR. HUNGAR: We have --

18 QUESTION: There is jurisdiction but you are free  
19 to file act of state or --

20 QUESTION: Wind it up.

21 QUESTION: -- statement of interest.

22 MR. HUNGAR: May I answer, Your Honor?

23 QUESTION: Yes.

24 MR. HUNGAR: The -- we -- there are currently cases  
25 pending against countries such as Japan and Poland, with

1    which -- which this country previously entered into  
2    agreements which both sides thought had resolved the issue  
3    entirely, and to now retroactively apply a substantive  
4    provision that this Court recognized in Ex parte Peru is a  
5    substantive, not merely jurisdictional, but a substantive  
6    legal defense, to apply that retroactively would be to  
7    change settled expectations, change the rules, and it should  
8    not be done.

9                   QUESTION: Thank you, Mr. Hungar.

10                  Mr. Schoenberg, we'll hear from you.

11                  ORAL ARGUMENT OF E. RANDOL SCHOENBERG

12                               ON BEHALF OF THE RESPONDENT

13                  MR. SCHOENBERG: Mr. Chief Justice, and may it  
14    please the Court:

15                  We believe there are four independent grounds for  
16    affirming the lower court in this case. First, as the Court  
17    has just discussed, the Foreign Sovereign Immunities Act  
18    regulates the exercise of jurisdiction, not the underlying  
19    primary conduct of the parties. Therefore, the Act does not  
20    operate retrospectively.

21                  QUESTION: Well, why doesn't it retro -- why -- why  
22    isn't it just as easy to say that it does operate  
23    retrospectively, because the question is, when should it  
24    exercise jurisdiction for a particular purpose? And on the  
25    one hand there's no point in exercising jurisdiction now if



1 it's not going to adjudicate later, so so far as the court  
2 is concerned, presumably it's going to adjudicate on a  
3 substantive issue.

4 That being the purpose, why can you -- why really  
5 does it make sense to draw that neat line?

6 MR. SCHOENBERG: Well, I'm -- I'm not sure that I  
7 understand the question.

8 QUESTION: Why -- why -- why isolate jurisdiction  
9 when we all know that the purpose of exercising the  
10 jurisdiction is to exercise it for the purpose of  
11 adjudicating a particular kind of case and to apply a  
12 particular substantive law to it?

13 MR. SCHOENBERG: Because the -- the operative  
14 event, the event that's being regulated by a jurisdictional  
15 statute, as the Court has said, is that exercise of the  
16 Court's power, regardless of when the underlying acts took  
17 place, the Court has differentiated between the primary  
18 conduct of the parties and the secondary conduct, which is  
19 the exercise of the Court's power.

20 For example, just last term in the Dole Food case,  
21 the Court found that the Foreign Sovereign Immunities Act is  
22 not intended to chill the conduct of the foreign state.  
23 Rather, it's there to decide whether now presently it would  
24 embarrass the conduct of foreign relations, and the -- 25  
25 years ago, over 25 years ago, Congress decided that cases

1 such as these should be allowed to go forward.

2 QUESTION: Well, the Government of the United  
3 States has just said you're going to embarrass foreign  
4 relations whether the United States' position with respect  
5 to a consideration in interpreting this act is raised now or  
6 whether it's raised after jurisdiction is assumed and you  
7 get to the next stage. Why not -- why not get into it now  
8 and consider it in interpreting the -- the scope of the act,  
9 in particular its retroactivity.

10 MR. SCHOENBERG: This would be a much different  
11 case if the foreign government had ever said that the  
12 prosecution of this case would interfere with foreign  
13 relations, as it has in all of these other cases. But it  
14 hasn't in this case, it hasn't filed a suggestion of  
15 immunity, it hasn't filed a statement of interest. A matter  
16 of fact, it required Austria to withdraw the act of state  
17 doctrine defense when it was asserted below. This case  
18 itself --

19 QUESTION: But I thought it just told us that it  
20 would be an interference three minutes ago.

21 MR. SCHOENBERG: The concern, as I understand the  
22 Government's concern, is that in other cases that are  
23 pending against Japan and Mexico, et cetera, there might be  
24 foreign relation issues.

25 QUESTION: Well, why -- why should we look further?

1 If the Government says that, I mean, isn't that conclusive  
2 in a case like this?

3 MR. SCHOENBERG: I don't -- I don't think so. I  
4 think there are two responses. First, the amount of  
5 deference that is given to the Government's litigation  
6 position under Bowen v. Georgetown and also INS v. St. Cyr.

7 QUESTION: Well, those are not cases involving  
8 foreign relations.

9 MR. SCHOENBERG: That -- that's correct, and that's  
10 why the second issue is very important. I believe it was  
11 Justice Powell who said in the first National City Bank case  
12 that -- that jurisdiction is not the same as justiciability.  
13 And what the Government is talking about is a justiciability  
14 question. Does the act of state doctrine, for example,  
15 prevent this case from going forward?

16 I'll give you another example, Your Honor. In --  
17 the same district court judge who handled our case and  
18 granted jurisdiction in our case, Judge Cooper, also was  
19 given a class action case asserting World War II era claims  
20 against Austria, this is the Anderman case. And just last  
21 April, she threw out that entire class action, because the  
22 Government had come in and filed a statement of interest and  
23 asserted its interest in the -- in the case, and she found  
24 very similar to the Court's holding in Garamendi last term  
25 that the political question doctrine was implicated when the

1 Government comes in and says that the prosecution of this  
2 particular case will interfere with foreign relations.

3 But I've never heard any -- in any other case the  
4 Government say that a case that does not implicate foreign  
5 relations, as this one does, should be dismissed on  
6 jurisdiction grounds merely because we have justiciability  
7 concerns with other cases.

8 QUESTION: What -- what is it if -- what do you  
9 reply to their, what I take is their argument, that if we  
10 say there is jurisdiction here, so that this covers pre-1952  
11 expropriations, think of all the eastern European bloc, what  
12 used to be, millions of pieces of real estate, et cetera,  
13 and Japan, Peru, all over the world, South America, there  
14 have been expropriations, and suddenly our Court becomes --  
15 become places where you litigate who owns property all over  
16 the world, at least if you trace an interest to an American  
17 citizen, for expropriations that may have taken under  
18 Maximilian of Mexico. I mean, see -- you see that kind of  
19 problem I think is what they're trying to raise.

20 MR. SCHOENBERG: Right. We're very --

21 QUESTION: What's the answer to that?

22 MR. SCHOENBERG: We're very sensitive to the  
23 Government's concern, the can of worms argument here. And I  
24 think the answer to it is that all of those cases present  
25 much more difficult problems than this one does in terms of,

1 for example, the statute of limitations. Your Honor, the  
2 statute of limitations is designed to get rid of old claims.

3 In our case, because of Austria's post-war conduct  
4 of concealment --

5 QUESTION: All right, statute of limitations.  
6 Let's go on, let's list a few other things, because --

7 MR. SCHOENBERG: There --

8 QUESTION: -- there might be instances where the  
9 statute hasn't run for all kinds --

10 MR. SCHOENBERG: Right.

11 QUESTION: -- of local reasons.

12 MR. SCHOENBERG: There's --

13 QUESTION: I don't know what the statute of  
14 limitations rule is in Peru and et cetera.

15 MR. SCHOENBERG: I can think of at least five  
16 problems that cases, old cases, would have. One would be  
17 statute of limitations. Form non-convenience may be a  
18 problem. It wasn't in this case. The act of state doctrine  
19 we've mentioned is also a serious problem in many of these  
20 cases. You have interference with treaties, which is also  
21 not this case. And you have interference with executive  
22 agreements, which is also not this case.

23 QUESTION: Can they come in and file a letter, in  
24 your opinion, assume you have jurisdiction to say, look,  
25 Judge, we don't want you to litigate this case, it

1 interferes with our foreign affairs, period?

2 MR. SCHOENBERG: Yes.

3 QUESTION: They can?

4 MR. SCHOENBERG: They can file that. I think it  
5 would have to be considered by the --

6 QUESTION: And they give a good reason, they give a  
7 good reason.

8 MR. SCHOENBERG: If there were a good reason why  
9 Austria's ownership of paintings would interfere with  
10 foreign policy --

11 QUESTION: But that's for a court to judge rather  
12 than the executive?

13 MR. SCHOENBERG: Well, there's a certain amount of  
14 deference that would have to be given to --

15 QUESTION: But no, but you're saying that the  
16 executive could say and have -- give a good reason, and the  
17 court could say, no, we don't -- we don't approve of that?

18 MR. SCHOENBERG: I think under -- under this  
19 Court's doctrine in foreign affair and policy -- foreign  
20 affairs policy -- there is an automatic deference given to  
21 the Government's suggestion that a particular case will  
22 interfere with foreign policy, but in most cases I think it  
23 would be quite clear. This case --

24 QUESTION: Well, what -- what case is it that says  
25 that the court should decide rather than the executive in

1 case like this?

2 MR. SCHOENBERG: Well, I believe, for example, in -  
3 - in Sabbatino, the Court did not immediately accept the  
4 Government's position as to whether a case should or should  
5 not go forward and said that it was -- now, I don't know  
6 whether that, whether Sabbatino, in that part of Sabbatino,  
7 it would still be good law today. I don't think that's been  
8 considered.

9 QUESTION: It -- we -- it wasn't the Court opinion,  
10 was it?

11 MR. SCHOENBERG: Right. It was a plurality  
12 opinion. But there is a suggestion, it may not be an  
13 answered question, Your Honor. I'm not sure I can point to  
14 a case that would -- would talk about the deference, but  
15 again, we're talking about not our situation, because the  
16 Government has not filed any suggestion of immunity or -- or  
17 statement of interest suggesting that this case would  
18 interfere with foreign policy.

19 QUESTION: Could -- could I ask about the act of  
20 state doctrine? I mean, even -- why isn't that in play  
21 here? I mean, even if giving -- holding Austria here would  
22 not be acting retroactively insofar as the exercise of  
23 jurisdiction is concerned, why wouldn't holding Austria  
24 liable for an act of state which previously would not be a  
25 basis for -- for challenge in this country, why wouldn't

1     that be acting retroactively?

2                   MR. SCHOENBERG: Well, we haven't addressed the act  
3     of state because it hasn't been raised and it was an  
4     argument that was dropped. I -- I can answer the question  
5     though. The act of state doctrine, as I understand it, is  
6     designed to prevent courts from entering into situations  
7     where there is no settled basis for deciding the case. In  
8     other words, in the Cuban cases where there's a regime that  
9     has a completely different property system than ours, it  
10    would be unwise for the courts to venture into this  
11    political dispute over whether communism or capitalism is  
12    the appropriate way to adjudicate these cases.

13                  In our case, we have a treaty, article 26 of the  
14    Austrian State Treaty says Austria must return property  
15    taken from Jewish families during the Nazi era. So there's  
16    no dispute between the two countries as to whether or what  
17    type of law would apply in this case. And under Sabbatino,  
18    it's very much qualified by the absence of a treaty  
19    governing the rule of decision.

20                  So I -- I don't think this case could ever pose an  
21    act of state problem. Other cases do though. That -- and  
22    that's -- that's really the point. These cases against  
23    Mexico, against Japan, against Poland could potentially pose  
24    serious act of state problems. This particular case  
25    doesn't. We'd be happy to litigate it.



1                   QUESTION: Whether it poses a problem or not, the  
2   suit is -- is resting upon -- is challenging an act of the  
3   state of -- of Austria that -- that occurred in Austria.

4                   MR. SCHOENBERG: That -- that's correct. Every  
5   suit against a foreign sovereign that's authorized under the  
6   Foreign Sovereign Immunities Act has the potential of  
7   interfering with foreign relations to the extent that it  
8   concerns the actual foreign country.

9                   QUESTION: Right. So the issue would be, should  
10   that be given retroactive application?

11                  MR. SCHOENBERG: In the act of state context.

12                  QUESTION: Yeah.

13                  MR. SCHOENBERG: Well, I -- I don't think --

14                  QUESTION: This is the act of state context. I  
15   mean, that's what's going on here.

16                  MR. SCHOENBERG: The act of state doctrine is a  
17   choice of law doctrine, as I understand it, and -- and so  
18   it, again, is not something that really operates  
19   retroactively, I think. I don't think to -- to echo what  
20   was said before that any country could have an expectation  
21   in how the act of state doctrine will apply in the  
22   particular case.

23                  QUESTION: How about the public acts?

24                  MR. SCHOENBERG: I'm sorry?

25                  QUESTION: This is a public act.

1                   MR. SCHOENBERG: Well, whether it's a public or  
2 private act to collect paintings, I'm not sure is so clear.

3                   QUESTION: Let's assume it's a public act. Does it  
4 have an expectation that -- that that will be adjudicated  
5 under the then-prevailing norms?

6                   MR. SCHOENBERG: I -- well, yes and no. Yes in the  
7 sense that we do have to establish that -- that this  
8 property was taken in violation of international law, and I  
9 think that part of the statute clearly expects that the  
10 taking be adjudicated according to the state of  
11 international law at the time. So to that degree I think  
12 yes. But whether -- whether it's a public or private act I  
13 think doesn't determine the -- the retroactivity question.

14                  QUESTION: But we're told that at least in this  
15 country such acts were never adjudicated in foreign courts.

16                  MR. SCHOENBERG: I -- I understood that to be the  
17 Government's position. I don't know how the Government  
18 explains the Santissima Trinidad case, which is a case  
19 concerning private property on a ship where not one, but  
20 several, sovereigns claimed an ownership interest, and  
21 Justice Story said that our courts, of course, have to  
22 adjudicate the ownership of that private property,  
23 regardless of whether it was taken as part of a public act.

24                  In the Santissima Trinidad, it's a confusing case,  
25 and I'm not sure, even having read it many times, how the

1 ship came to be in its final location, but as I understand  
2 it, it went through many different, many different hands.  
3 And the question at the end was, because the sovereigns were  
4 claiming the ship, which was potentially a ship of war, does  
5 that mean that the Court could not adjudicate the ownership  
6 of cargo on the ship? And Justice Story said no.

7 QUESTION: No, but he -- isn't the -- the concern  
8 about the applicability of that case to this one is  
9 precisely the reason you said. It was -- it was a suit  
10 between sovereigns and we're talking here about the  
11 sovereign immunity defense in a suit by an individual, and  
12 it's rather a stretch to take that as -- as the basis for  
13 your law in this case.

14 MR. SCHOENBERG: Well, I would -- I would think  
15 that the act of state doctrine, which is what we were  
16 talking about, would -- would be implicated even more  
17 strongly in a -- in a suit involving multiple sovereigns  
18 than it would with regard to just an individual against a  
19 sovereign. And I -- I -- the Government makes the position  
20 I think for the first time today that the expropriation  
21 clause sort of appeared from nowhere, but I don't think  
22 that's the case. The first section of 1605(a)(3) very  
23 clearly is the Santissima Trinidad case. That's the  
24 property is inside the United States in connection with the  
25 commercial activity.

1           The second clause I believe arises out of the  
2 Cuban expropriation cases and the Government's experience in  
3 those cases, and it was the intention of the Government in  
4 1976 when the executive branch proposed this law and when  
5 the Congress enacted it to allow our courts to adjudicate  
6 these types of claims.

7           QUESTION: Well, what -- what I'm looking for, I'm  
8 beginning to understand his answer better -- I think there  
9 should be a way, not in your case necessarily, but in  
10 general, for the Government to say, court, stay out of this  
11 case, because of the international implications. And what I  
12 was thinking is if we -- if this is jurisdictional, follow  
13 Justice Powell's distinction, that won't be a problem  
14 because there'll be other ways for them to do it. You're  
15 gradually closing those doors.

16           One way I had thought of was act of state, but you  
17 correctly point out that the act of state doctrine does not  
18 bar anything when the claim rests upon a treaty or other  
19 unambiguous agreement, and your quoting the '55 treaty might  
20 not help you because it's post-'48, but a -- but 1907 might  
21 help you, so you're there with a treaty.

22           And so they say, well, we can't use that one, and  
23 there'll be a lot of cases when we can't. So then I had  
24 mentioned this thing called a statement of interest, which I  
25 was looking for an explanation because I don't know what it

1 is. And there's a third thing that you mentioned, which is  
2 called a letter about immunity. Well, that won't help them  
3 because that's what this statute is.

4 See, so that now we're back to the statement of  
5 interest. Now, can -- what is this thing, a statement of  
6 interest? Can -- in other words, is the statement of  
7 interest sufficient to achieve the objective that I was  
8 thinking was important, that not necessarily your case, but  
9 in many other cases there has to be a way for the executive  
10 to stop the judge from deciding the matter where it really  
11 does interfere with foreign relations.

12 Now, what's -- do you see where I'm --

13 MR. SCHOENBERG: I --

14 QUESTION: Do you see that that is the thing that  
15 has been floating in my mind --

16 MR. SCHOENBERG: I understand --

17 QUESTION: -- and I'm trying to settle on.

18 MR. SCHOENBERG: I understand. It's, of course,  
19 difficult for us to talk about it because there is no  
20 statement of interest in this case, but --

21 QUESTION: But you can explain to me what a  
22 statement of interest is.

23 MR. SCHOENBERG: Right.

24 QUESTION: And whether a statement of interest is a  
25 sufficient legal route to achieve the end that I think is

1 necessary and that they're arguing for.

2 MR. SCHOENBERG: I believe if -- if the Government  
3 were to file a statement of interest saying that the  
4 prosecution of this particular lawsuit would interfere with  
5 the foreign relations of the Government, I think a court  
6 would be proper in abstaining from adjudicating the case  
7 under the political question doctrine, very similar to this  
8 Court's holding last term in Garamendi, I think.

9 QUESTION: But it wouldn't have to, in your view?

10 MR. SCHOENBERG: I would say it would -- it would  
11 be very -- it would almost always have to. I think -- I  
12 think the Court should still be allowed to determine whether  
13 -- whether there is really a basis for the Government's  
14 position. I -- I wouldn't say that our courts necessarily  
15 have to bend always to the Government's position with regard  
16 to a statement of interest. I think that's the -- the  
17 import of the first National City Bank case and -- and --  
18 and the -- the Sabbatino case and Alfred Dunhill also.

19 QUESTION: But I -- I take it that in no case, in  
20 no instance would you concede the appropriateness of -- of  
21 the statement of interest being considered at the  
22 jurisdictional as opposed to the justiciability of --

23 MR. SCHOENBERG: That's -- that's absolutely  
24 correct. We're talking today only about the jurisdiction  
25 question. There hasn't been a statement of interest filed

1 and there couldn't be a suggestion of immunity. I'm sorry,  
2 Your Honor.

3 QUESTION: No, I'm sorry. What do you do about  
4 Verlinden?

5 MR. SCHOENBERG: Verlinden actually is a great case  
6 for us as I realized in reviewing it. Verlinden is -- is a  
7 retroactive application of the Foreign Sovereign Immunities  
8 Act. In that case it was a foreign company against a  
9 foreign state, something for which there was no jurisdiction  
10 in the United States prior to the enactment of the Foreign  
11 Sovereign Immunities Act. That action arose in 1975 and yet  
12 when it was brought under the Foreign Sovereign Immunities  
13 Act several years later, this Court directed the lower court  
14 to adjudicate jurisdiction under the Foreign Sovereign  
15 Immunities Act.

16 So that case is exactly a -- if -- if anything is  
17 retroactive, that's a retroactive application of the Foreign  
18 Sovereign Immunities Act. But again, it goes back to this  
19 Court's statements in Landgraf that jurisdictional statute  
20 which confers or ousts jurisdiction is not impermissibly  
21 retroactive and that --

22 QUESTION: Did -- Verlinden didn't expressly  
23 discuss the right to retroactivity?

24 MR. SCHOENBERG: It absolutely did not discuss  
25 retroactivity. It maybe never occurred to any of the

1 Justices or the parties at that time that a jurisdictional  
2 statute like the Foreign Sovereign Immunities Act could be  
3 in any way --

4 QUESTION: No, but they -- but we did say that it  
5 wasn't just a jurisdictional statute. That's what we said.

6 MR. SCHOENBERG: The -- the Court said that it was  
7 substantive in Republic of Mexico v. Hoffman in 1945. The  
8 Court refers to sovereign immunity as substantive law. But  
9 I think as this Court has said, whether you label the -- the  
10 law substantive or procedural really isn't the question.  
11 The question is, on what activity is -- is the statute  
12 operating? And here it's operating on the claim to immunity  
13 and how that is adjudicated by our courts in deciding  
14 whether the court has the jurisdiction --

15 QUESTION: But that -- that has a bearing on the  
16 Landgraf exception too. If a statute is more than  
17 jurisdictional, you know, it isn't so easily disposed of  
18 under Landgraf.

19 MR. SCHOENBERG: It's correct, but I think this  
20 case presents a much better case than the two cases cited in  
21 Landgraf, the Andrus case and U.S. v. Alabama, although U.S.  
22 v. Alabama you could distinguish as something seeking only  
23 injunctive relief and therefore prospective. In Andrus,  
24 this is a case brought against the U.S. Government after the  
25 U.S. Government -- or while the case was pending, I think,



1 the statute is changed to take away the amount in  
2 controversy requirement. So, in other words, very clearly  
3 before the suit could not proceed, now the statute's been  
4 changed without any suggestion of retroactivity in the  
5 enactment. And the Court says -- this is 1978, I think --  
6 it's of no moment that this jurisdictional statute has been  
7 changed now to allow a suit against in -- in a sovereign  
8 entity, the United States.

9           So I think this case presents actually a much  
10 better -- much better case, because here, and these are  
11 other points that I wanted to raise, I believe the text of  
12 the Foreign Sovereign Immunities Act demonstrates that it  
13 was intended to apply to all claims to immunity, regardless  
14 of when the acts took place, the underlying acts took place.

15           Our -- our third point --

16           QUESTION: May I just ask you on that, I mean,  
17 isn't the objection to that that the -- that the subject  
18 matter we're concerned with here is a subject matter which  
19 is defined in terms of property and the history of that  
20 property, and the history of that property as expropriated  
21 necessarily raises the time question? And if the time is  
22 prior to the -- the enactment of the statute, we  
23 necessarily, by the definition of present subject matter,  
24 get into an issue of retroactivity. What -- what's the  
25 answer to that?

1                   MR. SCHOENBERG: Well, the answer is, again, in  
2 Landgraf that not every statute which affects prior events  
3 is impermissibly retroactive, and my point was --

4                   QUESTION: But it's not impermissibly retroactive,  
5 but it raises the question about the permissibility of a  
6 retroactive application.

7                   MR. SCHOENBERG: Well, I -- my view is that the  
8 Foreign Sovereign Immunities Act is -- is a statute that is  
9 designed to take away the immunity decision from the State  
10 Department and place it in the hands of judges, and the  
11 purpose of the statute was that henceforth all claims to  
12 immunity should be adjudicated under this procedure, not the  
13 old procedure. In other words, the U.S. Government's  
14 position should --

15                  QUESTION: Yeah, but even -- even that, with  
16 respect, it seems to me that that begs the question. The  
17 court is going to adjudicate. The question is whether in  
18 adjudicating them it is going to draw a line based on -- on  
19 -- on this temporal consideration. That still leaves it in  
20 the hands of the court. But the question is whether in the  
21 hands of the court retroactivity ought to be a basis for  
22 making the jurisdictional decision.

23                  MR. SCHOENBERG: I -- I don't -- I don't see -- I  
24 don't think that it is with regard to the text of this  
25 statute. I -- even though the statute does refer to events

1 that could take place prior to the enactment, the purpose of  
2 the statute, which is what I think the analysis requires  
3 that we consider, is to change the forum of the adjudication  
4 from the old State Department procedure to the -- to the  
5 court procedure under these specific rules.

6 QUESTION: How does your -- the discussion about  
7 the statement of interest then fit in? It seems to me what  
8 you just said is, they meant to take it away from the State  
9 Department and put it in the hands of the court.

10 MR. SCHOENBERG: The -- the immunity consideration,  
11 yes, but I think the statute, the Foreign Sovereign  
12 Immunities Act, was not intended to change the rules, for  
13 example, with the act of state doctrine or with the statute  
14 of the limitations or with any of the other doctrines that  
15 might bar an older claim from -- from entering court.

16 Our third point, this I don't want to spend too  
17 much time on, but it's our view that the Foreign Sovereign  
18 Immunities Act merely codified the common law of sovereign  
19 immunity, and therefore, it did not substantially change the  
20 law. And this is not only my opinion. If one looks at the  
21 State Department circular that was sent out in 1976 to  
22 foreign states, it says, this enactment will not  
23 substantially alter the rules for deciding sovereign  
24 immunity questions in U.S. courts. So it was the position  
25 of the State Department at the time that they proposed this

1 legislation that it merely codified what the State  
2 Department then considered to be the rules of sovereign  
3 immunity.

4           And we have an interesting situation, I think an  
5 unprecedented situation, because the common law itself  
6 depended on the views of the State Department, so we have a  
7 little bit of a reflexive situation. The way I look at it,  
8 let us suppose, for example, that the -- that instead of  
9 enacting the Foreign Sovereign Immunities Act they issued  
10 another Tate letter, another letter that merely said,  
11 henceforth we want the courts to adjudicate under this --  
12 under this regime. So it's not a new statute, it's just a  
13 suggestion to the courts on how to decide cases.

14           Under this Court's ruling with regard to common  
15 law, non-statutory law, of course that -- that approach  
16 would have to be applied retroactively, and I don't think  
17 it's any less retroactive just because the executive branch  
18 sent it over to Congress and said, we want you to pass the  
19 statute also. Our last --

20           QUESTION: Any -- any more retroactive?

21           MR. SCHOENBERG: Any more retroactive. Our last --  
22 our last point is really the basis for the Ninth Circuit's  
23 decision, and that is, as to these parties in this case,  
24 there is no impermissibly retroactive effect, because  
25 Austria could never have had any expectation of immunity

1 with regard to Mrs. Altmann's claims.

2 QUESTION: That would be a pretty good nightmare,  
3 wouldn't it, if we had to have judges trying to work out on  
4 a case-by-case basis, country by country, whether Turkey in  
5 1921 when it was an enemy, had a -- didn't have an  
6 expectation of being treated as a sovereign, but Hungary in  
7 1962 had a different expectation, et cetera. I mean, that -  
8 - that -- I think their point on that's a pretty good one,  
9 isn't it?

10 MR. SCHOENBERG: Well, it -- it's -- but it's not a  
11 point about retroactivity, Your Honor. The --

12 QUESTION: Well, it is because they're saying that  
13 unless you treat these things as a whole, you won't  
14 understand the problem. And even if in your case the  
15 country had no expectation, there are so many countries that  
16 did that -- and going into it case by case is so difficult  
17 that it would better to have an absolute rule. That's their  
18 arguments.

19 MR. SCHOENBERG: It would be better, but that's not  
20 really how the Court's retroactivity analysis has gone over  
21 the last 10 years, and that's -- that's why I certainly  
22 favor some of the earlier arguments. I think it's easier to  
23 decide the case on those, rather than the way the Ninth  
24 Circuit did in evaluating the expectations, but if one  
25 doesn't decide in our favor on all of those other arguments,

1 that the statute itself is jurisdictional, that Congress  
2 intended it to apply, that there's really no change in the  
3 law because it's the same as the common law of sovereign  
4 immunity, then really under Hughes one has to look at  
5 whether, as to the parties of this case, there is any  
6 retroactive effect, and that -- that's -- that's what the  
7 Hughes holding is. It's a statute phrased jurisdictionally,  
8 but let's look at what happened here. You have a new  
9 plaintiff with new incentives and a defense, substantive  
10 defense taken away. That's the Hughes case.

11 And so it requires you to look outside the four  
12 corners of the statute to look at what was -- what are you  
13 comparing the statute to, when -- when in Hughes the Court  
14 said if it determines whether a cause of action can proceed  
15 and not where, the where question, of course, implies that  
16 you have to look and see if there are other jurisdictions  
17 where the case could be brought.

18 And in this case, as we've made very clear,  
19 Austria could always have been sued, at least since it was  
20 re-established after World War II for these acts, and as a  
21 matter of fact, Austria was required by the United States to  
22 enact restitution laws that were designed to afford people  
23 like Mrs. Altmann relief. They have never asserted  
24 sovereign immunity in these claims in their own courts and  
25 they would not have been allowed to by the U. S. Government,

1 and that sentiment, of course, is echoed in the subsequent  
2 treaty in 1955 and it's echoed in the Bernstein letter in  
3 1948 that as to expropriations, as to property taken from  
4 Jewish families in violation of international law, this  
5 country does not recognize sovereign immunity anywhere, not  
6 in the states where -- where -- that were involved, and not  
7 in the United States, and that -- that's -- that's our last  
8 point and that's the Ninth Circuit's position.

9 If the Court has no further questions --

10 QUESTION: Is it -- is it correct that -- that we  
11 would be out of step with all other countries if we -- if we  
12 allowed this suit to proceed?

13 MR. SCHOENBERG: Well, certainly not as a matter of  
14 -- of the statute. Our -- our -- in terms of --

15 QUESTION: No, no. I mean -- I mean, have -- have  
16 all other countries, when they've changed to the new modern  
17 notion of limited sovereign immunity, have they all declined  
18 to -- to apply it in a manner that the Government here would  
19 call retroactive?

20 MR. SCHOENBERG: Right. I -- I don't know how all  
21 states have done it. I know that, for example, in Austria  
22 we cited the Dralle case, which concerned a post-war  
23 communist expropriation of a -- of a subsidiary company in  
24 Czechoslovakia, and a German company was allowed to sue  
25 Czechoslovakia in Austria concerning the trademarks and --

1 and the expropriation, and have an Austrian court rule  
2 whether that expropriation violated international law.

3 So I would say as to Austria, the argument is, and  
4 I think we cited also in our brief a statement by an  
5 Austrian professor, Seidl-Hohenveldern, who said that the  
6 courts -- there's nothing in international law that prevents  
7 courts from adjudicating the rights and property taken in  
8 violation of international law.

9 Thank you very much.

10 QUESTION: Thank you, Mr. Schoenberg.

11 Mr. Cooper, you have five minutes remaining.

12 REBUTTAL ARGUMENT OF SCOTT P. COOPER

13 ON BEHALF OF THE PETITIONERS

14 MR. COOPER: Thank you, Mr. Chief Justice. Just on  
15 that last point, the Dralle case, which is one that we  
16 address in our reply brief, does not stand for the  
17 proposition that Czechoslovakia's expropriation could be  
18 second-guessed in Austria. Quite the contrary. Austria  
19 determined that the legality of Czechoslovakia's activities  
20 in their own -- in its own country were not subject to  
21 reconsideration in Austria. Austria concerned itself only  
22 with whether, given its own neutrality as between  
23 Czechoslovakia and Germany, whether Austria could give  
24 effect to an expropriation as an act of war. And it  
25 determined that it could not with respect to property



1 located in Austria. That issue has nothing to do with  
2 what's before the Court today.

3 Sovereign immunity isn't merely a form selection  
4 rule. It confers on the foreign state the right to choose  
5 whether and where to be sued. That's a substantive right.  
6 It's a right this country has always understood as a right  
7 in a sovereign. Austria's choice, if it did so choose, the  
8 circumstances under which it would provide remedies in its  
9 own country, either by statute or in its own courts, doesn't  
10 constitute a waiver of the sovereignty to which it had been  
11 accorded in this country throughout the current period up to  
12 1976.

13 So this country has always recognized the  
14 difference between a sovereign's right to create a remedy,  
15 and this country has done so in its own instances with  
16 respect to events that were claimed to be the subject of  
17 reparations, and by doing so it has never suggested that it  
18 thought it was subjecting itself to the jurisdiction of a  
19 foreign court for individual claims to be able to look for  
20 more than the statute of the United States provided for.

21 In addition, with respect to the law immediately  
22 prior to the enactment of the FSIA, I think the suggestion  
23 was that somehow the United States had -- had eroded the  
24 expropriation rule or that Congress thought that it was  
25 adopting the -- codifying the law of the land with respect

1 to expropriation in the FSIA, and that plainly is not true.  
2 The legislative history, and more importantly the statements  
3 of the State Department, in particular the -- the digest by  
4 John Boyd with respect to State Department decisions from  
5 1952 to 1976 cited in our brief make it clear that the State  
6 Department considered this to be a fundamental change in the  
7 law.

8           The conduct being regulated here is expropriation  
9 or at the very least possession that goes back to events in  
10 1948 alleged in the complaint. It is not the mere question  
11 of the exercise of jurisdiction here or, worse yet, this  
12 mere substitution of another tribunal. This is something  
13 that Congress focused on in each of the expropriation  
14 exceptions. It identified the conduct that it thought the  
15 foreign sovereign had engaged in that justified one of our  
16 narrow exceptions to the general concept of foreign  
17 sovereign immunity.

18           Whether that was an express waiver under (a)(1),  
19 whether that was the exercise of commercial conduct that any  
20 private party could engage in under (a)(2) or the -- or the  
21 expropriation of property in violation of international law  
22 in (a)(3), Congress identified the conduct that it thought  
23 justified the lifting of the generally applicable foreign  
24 sovereign immunity and decided that's the conduct we want to  
25 regulate. And that's what we think justifies the variance

1 from our general rule with respect to sovereigns, and that  
2 is a change in the law that requires application of the  
3 retroactivity analysis to treat those sovereigns fairly.

4 If there are no further questions, I have nothing.

5 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Cooper.

6 The case is submitted.

7 (Whereupon, at 12:13 p.m., the case in the above-  
8 entitled matter was submitted.)

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